IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 231

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND LONG ISLAND LIGHTING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE SUPERIOR OIL COMPANY

WILLIAM T. KILBOURNE II
1725 K Street, N. W.
Washington, D. C. 20006
Attorney for Petitioner
The Superior Oil Company

Of Counsel:
MURRAY CHRISTIAN, *General Counsel*
H. W. VARNER, *Asst. General Counsel*
HOMER J. PENN
The Superior Oil Company
P. O. Box 1521
Houston, Texas 77001

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AUTHORITIES CITED

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia, sub nom *Public Service Commission of the State of New York, Petitioner* v. *Federal Power Commission, Respondent,* No. 19,796, et al., is reported at 373 F. 2d 816 (CADC 1967). The opinion and orders of the Federal Power Commission, H. L. Hawkins and H. L. Hawkins, Jr., Operator, et al., Docket No. G-18077, et al., are reported at 34 FPC 897 (1965) and its opinion on rehearing is reported at 34 FPC 1330 (1965). Joint Appendix III R. 7292-7317 and III R. 7505-7509.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit wherein the Federal Power Commission was reversed and the case remanded to the Federal Power Commission for further proceedings consistent with said judgment was entered on February 7, 1967. On May 4, 1967, Petitioner filed an application for an extension of time in which to file petitions for writ of certiorari with the Chief Justice of the United States requesting therein an extension of time to and including June 8, 1967. On May 8, 1967, this Court issued its order extending time to file petition for writ of certiorari, as requested. On June 8, 1967, a timely petition for writ of certiorari to the District of Columbia Circuit Court of Appeals was filed. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is the Fifth Amendment to the Constitution. The statute involved is the Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, particularly Section 7 thereof. The pertinent portions of the respective provisions of the Constitution and the Statute are set forth in Appendix A hereof.

QUESTIONS PRESENTED

The Court below recognized that the concept of an in-line price is an artificial one created by this Court in *Atlantic Refining Company* v. *Public Service Commission of New York* (CATCO), 360 U.S. 378 (1959). The adoption by the Commission of the suspect price

doctrine created by the Ninth Circuit in *U.G.I.* v. *F.P.C.*, 283 F. 2d 817 (9 CCA 1960) and the Commission in-line pricing technique was affirmed by this Court in *U.G.I.* v. *Callery Properties, Inc., et al.*, 382 U.S. 223 (1965). The principles set down by these cases are in conflict with the in-line pricing techniques utilized by the Commission to determine the in-line prices in Railroad District No. 3 for the period 1958-63.

Questions presented are:

1. Is the Commission, in establishing the several in-line prices, obligated to disregard current conditions in the areas which might affect the price levels, when such current conditions are reflected by certain high-priced final permanent certificates, temporary certificate prices, contract prices and the Commission's price guidelines promulgated in its Statement of General Policy 61-1?

2. Does the Commission have discretion to determine an in-line price after elimination of certain final permanently certificated prices and rely entirely upon prices in those final permanent certificates remaining *without reexamining either the prices eliminated or those relied upon by the same standards*?

3. Does the Commission have the discretion to determine an in-line price in this proceeding on the basis of a weighted average price which includes all permanent certificates below 14 cents per Mcf when in prior proceedings the weighted average price used to determine the in-line price was based only on permanent certificate prices at or above 14 cents per Mcf?

4. Is it a requirement of producer applicants, or even the Federal Power Commission itself, to show in a Section 7 proceeding that the gas to be sold will (a) not eventually be used by consumers in an economically inferior way, (b) not be wasted through an over-supply situation and (c) be needed by the public?

STATEMENT OF THE CASE

The Superior Oil Company, Petitioner in No. 231, was one of 36 consolidated applicants seeking authority under Section 7(c) of the Natural Gas Act to commence deliveries to an interstate pipeline through the issuance of an acceptable permanent certificate of public convenience and necessity from two separate fields located in Texas Railroad Commission District No. 3 (District No. 3). Separate contracts covered the two proposed sales to Florida Gas Transmission.

The earlier sale, FPC Docket No. G-20359, proposed to sell to Florida Gas Transmission gas produced from the Pheasant Field, Matagorda County, under contract dated August 1, 1959, filed as Superior's FPC Gas Rate Schedule No. 99, at a proposed price of 17.5 cents per Mcf at 14.65 psia.[1] An unconditioned temporary certificate was issued to Petitioner authorizing deliveries of natural gas at the contract price of 17.5 cents per Mcf by Commission Order of November 2, 1961.

Superior's second sale, Docket No. CI63-584, covers the proposed sale to Florida Gas from the Oliver Field, Brazoria County, Texas, under a contract dated September 20, 1962, filed as Superior's FPC Gas Rate Schedule No. 109, at a proposed price of 17.5 cents per Mcf at 14.65 psia.[2] A temporary certificate was requested by Petitioner and the Commission offered Petitioner a temporary certificate to deliver gas at a price of 17.5 cents per Mcf conditioned to the further pos-

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[1] III R. 2316. A permanent unconditioned certificate was issued Petitioner by Commission Order dated September 19, 1960. A year later the permanent certificate was rescinded over the protest of Petitioner.

[2] III R. 3078.

sibility of refund down to 16 cents per Mcf refund floor.

Subsequent to the issuance of the unconditioned temporary certificate and conditioned temporary certificate, sales have commenced from both fields to Florida Gas for resale in interstate commerce.

Superior is the only Petitioner who, in the Hawkins proceeding before the Commission and on review before the D. C. Circuit, has claimed the Commission has erred in its determination of the proper initial price at which certificates could issue. In an effort to avoid duplication of facts and procedural development, Petitioner adopts the Statement of the Case contained in the Joint Brief filed in Nos. 60, 111, and 143, with the exception that those Petitioners consider the primary question in the Hawkins record to be the determination of the in-line price for the period subsequent to the issuance of the Statement of General Policy 61-1 on September 28, 1960. Superior submits that the determination of the in-line price issue for the period prior to and subsequent to the issuance of the Statement of General Policy 61-1 on September 28, 1960, are equally deserving of this Court's review.

Docket No. G-20359, the sale proposed between Florida Gas and Superior, under contract of August 1, 1959, was consolidated with other previously consolidated dockets on March 31, 1960 in the Coastal Transmission proceeding, No. G-18338, et al. By separate order of that same date, the Public Service Commission of the State of New York was denied intervention in the Coastal Transmission proceeding. At the time of denial of intervention, Superior was not a party to that proceeding.

On September 19, 1960, after severance from the Coastal Transmission proceeding, a permanent certificate was issued under the abridged procedures. *Ohio Oil Company, et al.*,[3] Docket No. G-17896. The permanent certificate issued Petitioner authorized a 17.5 cent per Mcf initial rate conditioned only "upon an order subsequently granting certificates to" Coastal Transmission Corporation. On August 9, 1961, the Commission issued an order in Docket No. G-18338, et al., Coastal Transmission Corporation, et al., authorizing Coastal Transmission to accept deliveries from Petitioner in Docket No. G-20359. On that same date and in the same order, the Commission rescinded the permanent certificates previously issued to Petitioner and substituted in lieu thereof new permanent certificates conditioning Petitioner to a future determination of the initial price for its sale to Coastal. Petitioner protested the rescinding of the previously issued permanent certificate and the conditions attached to the new proffered conditioned permanent certificate. 26 FPC 318 (1961)

On November 2, 1961, the Commission set aside its August 9, 1961 order and held that pending the determination of the price issue, producers who received permanent certificates under the abridged proceeding in *Ohio Oil Company, et al.*, Docket No. G-17869, et al., would continue to sell gas to Coastal (Florida Gas) "pursuant to the terms of temporary authorizations heretofore issued each such producer without modification pending issuance of permanent certificates."[4]

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[3] Not reported in Federal Power Commission Reports.

[4] 26 FPC 683 (1961).

Said order further stated:

> "Producers who have accepted temporary authorizations and are delivering gas thereunder cannot discontinue their service without compliance with the abandonment requirements of Section 7(b) of the Act, and therefore we should not modify the terms and conditions under which they committed their gas to the interstate market by the addition of price and refund conditions without first affording them an opportunity for hearing."[5]

And still further:

> "We will also tender temporary authorization to the remaining producers herein under Section 157.28 of our Regulations under the Act, permitting them to sell gas to Coastal. In issuing temporary authorizations to these producers, we will permit them to *render service under their rate schedules without any conditions* relating to initial prices where such prices are at or lower than those price levels set forth in our Policy Statement 61-1 as amended."[6] (Emphasis added)

The Policy level at that time was 18.0 cents per Mcf at 14.65 psia and Superior's contract price of 17.5 cents in reliance on said Policy was negotiated at a lesser rate.

Petitioner contended before the Commission that its contract price of 17.5 cents per Mcf was in line for both sales when considered with the line of prices permanently certificated in other sales in District No. 3

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[5] Ibid.

[6] Ibid.

contemporaneous in time and otherwise comparable to Petitioner's interstate sale.[7]

The Commission determined that the in-line price for District No. 3 was 16 cents per Mcf for sales prior to September 28, 1960 and 17 cents per Mcf subsequent to that date. The Commisison determination was based on a record which included only a contract price study of all temporary and permanent certificate sales made in District No. 3 since 1954. Offers of other cost and economic studies to support their contract prices contained in the applications were excluded by the Hearing Examiner and affirmed by the Commission citing *Skelly Oil Company,* Opinion No. 362, 28 FPC 401. Such exclusionary ruling has received this Court's approval in *U.G.I.* v. *Callery Properties Inc.,* 382 U.S. 223, 86 S. Ct. 360 (1965). The Commission relied upon selected permanent certificate price arrays for District No. 3 for the two periods under study, i.e., January 1, 1958 through September 27, 1960 and September 28, 1960 through December 31, 1963, to determine the in-line price. These tables reproduced below, without modification, state an average price weighted by volume for the Pre-Statement period of 15.16 cents per Mcf and the Post-Statement period of 16.17 cents per Mcf.

[7] Commission Opinion No. 321, Trunkline Gas Company, 21 FPC 704, issued 20-cent permanent certificates in Texas District No. 3 only two months prior to Petitioner's contract negotiations with Coastal Transmission (now named Florida Gas Transmission). Such Commission action directly affected the contract negotiation.

DISTRIBUTION OF PRICES PERMANENTLY CERTIFCATED
(Dated 1-1-58 through 9-27-60)

Total Initial Price (¢)	Number of Sales	Estimated First Month Volumes (Mcf)	Percent of Total Volume
Less than 10.0	3	120,000	4.50
13.5	8	116,100	4.35
14.0	3	60,750	2.28
14.2	1	45,000	1.69
14.4	1	90,000	3.38
14.5	4	132,000	4.95
14.6	2	96,000	3.60
15.0	8	295,075	11.07
15.1	1	60,000	2.25
15.2	3	166,170	6.23
16.0	4	968,000	36.31
16.2	4	514,000	19.28
17.5	1	2,190	0.08
18.0	1	731	0.03
	44	2,666,016	100.00

DISTRIBUTION OF PRICES PERMANENTLY CERTIFCATED
(Dated 9-28-60 through 12-31-63)

Total Initial Price (¢)	Number of Sales	Estimated First Month Volumes (Mcf)	Percent of Total Volume
12.0	2	24,000	2.13
13.0	2	75,000	6.64
13.5	2	33,615	2.98
14.0	2	42,000	3.72
14.5	3	75,000	6.64
15.0	9	213,100	18.88
16.2	3	155,000	13.73
16.5	1	30,000	2.66
18.0	3	481,040	42.62
	27	1,128,755	100.00

Contract prices were not considered in arriving at the average price weighted by volume but rather were found to be useful only to show economic trends in the area.

Temporary certificates, although considered of primary importance in the *Amerada Petroleum Corporation, et al.,* Opinion No. 422 price determination, were not considered in arriving at the average price weighted by volume. 31 FPC 623 (1964).

Nine large volume[8] permanently certificated 20-cent sales no longer subject to Court review which the Commission admitted, if fully considered would have "a strong effect on the weighted average price of 15.16 cents per Mcf" for the Pre-Statement period,[9] were excluded from the price determination.

In addition the Commission affirmed the Examiner's exclusion of six dockets which were permanently certificated at settlement prices ranging from 16 cents to 18 cents[10] per Mcf, pursuant to separate Commission Orders.

Certificates no longer subject to review and final in all respects covering substantial volumes of gas flowing in interstate commerce were excluded.

The Commission, after citing the Texaco Seaboard Opinion No. 383, and *Hassie Hunt,* Opinion No. 412, decisions, by name only and without further rationale or justification for its conclusion, excluded large volume

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[8] III R. 1432-1433. 1,515,650 Mcf estimated for the first month of deliveries.

[9] III R. 7294.

[10] Docket No. G-19559, Cities Service Oil Company, was settled, per Commission Order of December 26, 1962, at 18.0 cents per Mcf. Estimated volumes totaled 300,000 Mcf per month or 3,600,000 Mcf per year. Actual volumes for 1963 totaled 3,586,405 Mcf (Form 301-B on file with the FPC). This one sale alone, excluded by the FPC, constitutes 10% of the limited volumes relied on by the FPC.

17.5 cent permanent certificate sales to Coastal Transmission Company.[11]

The Commission also did not consider evidence of intrastate prices in District No. 3 despite evidence that large volumes moved at 19.5 cents and 21.5 cents and a weighted average for all ten intrastate Pan American Petroleum Corp. sales comparable to the total interstate volumes being considered, was 19.329 cents per Mcf.[12]

The Commission, after such eliminations, found no reason to disturb the previously determined 16-cent in-line price in the *Seaboard* and *Hassie Hunt Trust* cases[13] for the Pre-Statement period. The Commission asserted that consideration was given to sales above the 16-cent price in order to arrive at the 16-cent in-line price. This cannot be true. Even with the questionable elimination of certain high-priced certificates, over 55 per cent[14] of the gas remaining[15] for Commission consideration was at or above the 16-cent price level and 20 per cent was above the 16-cent price level.

For the Post-Statement period, The Commission noted that a number of sales and moderate volumes

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[11] III R. 7298. Estimated volumes total 472,183 Mcf for the first month of deliveries.

[12] III R. 7297; R. 319. 2,666,016 Mcf per month interstate vis-a-vis 2,811,000 Mcf per month intrastate.

[13] *Texaco Seaboard* Opinion 383, 29 FPC 593 (1963), *Hassie Hunt Trust, Operator, et al.*, Opinion No. 412, 30 FPC 1438 (1963).

[14] Estimated volumes total 1,484,921 Mcf for first month of deliveries.

[15] Estimated volumes total 2,666,016 Mcf for first month for all deliveries.

moved at the 15-cent, 16.2-cent and 16.5-cent levels.[16] Very large volumes moved at the 18-cent price level.[17] In addition, the Commission stated consideration of unconditioned temporaries and contract prices justified a 17-cent in-line price for the Post-Statement period.

The District of Columbia Circuit Court concurred with the Commission in the elimination of the nine 20-cent high volume permanent prices from any determination in the price line. The Court also concurred in the Commission determination that the 1956-57 Coastal sales, although permanent and no longer subject to judicial review, should not be considered in the price line determination. The Court of Appeals sustained the Commission's determination of the 16-cent in-line price in District No. 3 for the pre-policy period. However, it reversed the Commission for considering contract prices or temporary certificate prices and held the consideration of the in-line price must be limited to permanent certificates for the Post-Statement period. The Court held that the Commission's Statement of General Policy guideline price levels should be given no weight whatsoever in determining the in-line price.

> "It is true that our decision may cause the in-line price to be frozen temporarily during this interim period between sales of gas and the rate determination under Section 4 or 5 of the Act. This kind of freeze seems to be required by the logic of CATCO and in-line pricing."[18]

The Commission was obligated, the Court held, to consider whether a public need existed for this gas be-

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[16] III R. 7295. 398,100 Mcf estimated for first month of deliveries.

[17] III R. 7295. 481,040 Mcf estimated for first month of deliveries.

[18] IV R. 4314.

fore it grants a permanent certificate to a producer and that the fact that Petitioner's gas was then moving in interstate commerce, and had been so moving since 1961, was not sufficient evidence that there was a present and future need for it. If the end use of such sale, as determined by the Commission, will be economically inferior, the Court held the sale should not be certificated.

The District of Columbia Circuit decision below is in conflict with the Tenth Circuit review of the *Amerada* proceeding, Opinion No. 422.[19] This Court granted certiorari on all questions presented by Petitioners in the consolidated certificate cases.[20]

SUMMARY OF ARGUMENT

During the last ten years, distribution companies and state commissions have selectively intervened in all Section 7 certificate proceedings wherein applicants have sought permanent certification above the 15-cent level in Texas Railroad District No. 3. The Commission has considered such proposed sales as suspect and therefore unreliable for purposes of determining the weighted average price for this area. These acts of intervention, coupled with misuse of the suspect price doctrine has frozen the price line or has even rolled it back to 1956 levels. The requirement in CATCO of price line currency is frustrated.

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[19] IV R. 4314. *Sunray DX Oil Co.* v. *F.P.C.*, 320 F. 2d 181 (10 CCA 1966).

[20] FPC and PSC, by separate memorandum, opposed the grant of certiorari to Petitioner's questions 2 and 3 wherein the price line methodology was challenged. Certiorari was granted to all Petitioners' questions, including 2 and 3, on October 9, 1967, No. 231.

This Court in *Callery* approved the Commission in-line concept intended to meet the CATCO requirement to hold the line pending the determination of the just and reasonable rate for this area. *Callery* held that the proper and only evidence necessary to establish a relevant price line was a field price study containing contemporaneous permanent and temporary certificates.

The Commission and the Court of Appeals have misapplied the principles of *Callery* in setting erroneous and unduly low price lines for the period prior to and subsequent to September 28, 1960. The Commission findings adopted from earlier proceedings to which Petitioner was not a party are unsupported by this record. Commission rulings giving no weight whatsoever to the large volume non-suspect permanently certificated sales, no longer subject to judicial review, result in an erroneous weighted average price. Nine 20-cent permanent certificates and six permanent certificates settled at or above the proposed line approximating the volumes considered by the Commission, were totally disregarded. Those prices, however, are not suspect. Those prices also were not alleged to be erroneously issued. They reflect prior well-considered Commission action and must be taken as correct. They should not be discounted or subjected to collateral attack by the Commission. Once the Commission has selected their method of in-line pricing by a review of non-suspect field price data only to determine all aspects of present and future public convenience and necessity, it does not have discretion to pick and choose among permanently certificated non-suspect prices not subject to review to find the price line. The Commission application in Texas Railroad District No. 3 of the

in-line method approved in *Callery* is based on prejudicial legal error and must be reconsidered.

The Commission should consider questions of public need of gas in pipeline certificate proceedings and not in producer certificate proceedings. Further, if such a determination of need is allowed in the producer certificate proceeding, the movement of gas in interstate commerce since 1961 and the resulting consumption is alone sufficient evidence of the pipeline's need for the gas.

ARGUMENT

I. THE EFFECT OF THE DECISION BELOW IS TO "FREEZE" THE PRICE LINE AFTER IT HAS ONCE BEEN DETERMINED BY THE COMMISSION, OR TO "ROLL IT BACK" TO THE PRICE LINE EXISTING IN AN EARLIER PERIOD.

Petitioner, in an effort to avoid duplication of argument, adopts Section I of the Joint Petitioner-Producers' Brief showing that the cumulative effect of (1) the action of the intervenors opposing by intervention and certification at a 15-cent price level or above, and (2) the exclusion of such proposed certificate prices from evidence in certificate proceedings under Section 7 because of such opposition alone creates a freeze in the price line once determined by the Commission, or perhaps a "rollback" to a line of prices existing at earlier periods.

II. NEITHER THIS COURT'S DECISIONS IN CATCO AND CALLERY NOR THE CIRCUIT COURT DECISIONS INTERPRETING THEM, REQUIRE A "PRICE FREEZE" UNTIL THE DETERMINATION OF A JUST AND REASONABLE RATE UNDER SECTION 4 AND 5.

Further, Petitioner hereby adopts Section II of the Joint Petitioner-Producers' Brief wherein it is argued that a price line freeze is not required by this Court's CATCO and *Callery* decisions and that a price line

freeze is contrary to public interest. Petitioner, however, does not adopt but denies the statement of the Joint Petitioner-Producers' Brief in the last paragraph of Section II-A to the effect that the Commission's decisions are based on substantial evidence. The elimination of numerous sales and most of the volumes of gas moving in interstate commerce contemporaneous with the sales at issue shows on the whole record that there is, in fact, no substantial evidence to support the Commission's findings.

III. THE COMMISSION ERRED IN ITS APPLICATION OF IN-LINE PRICING TECHNIQUES TO DETERMINE THE PROPER INITIAL PRICES.

Petitioner asserts that the Commission determination of the price line for the periods prior and subsequent to September 28, 1960 were erroneously low and the Court below erred in affirming such prices. The record shows, even after the eliminations of suspect sales, that findings of a higher price for both periods are required. The proper consideration of: non-suspect permanent certificates; actual rather than estimated sales volumes where available; the issuance of conditioned and unconditioned temporary certificates; the intrastate price data and trends; and the elimination of non-comparable low volume sales at or below a 14-cent price, individual or in combination, justify higher in-line price determinations for both periods.

Petitioner accepts this Court's CATCO decision[21] which recognized broad powers to review and condition Section 7 certificate applications and the concept of interim in-line pricing pending the determination of just and reasonable applicable rates.

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[21] 360 U.S. 378, 79 S. Ct. 1246 (1959).

Petitioner also recognizes the Commission's power to condition temporary certificates, *F.P.C.* v. *H.L. Hunt,* 376 U.S. 515 (1964), and the effect of this Court's decision in *U.G.I., et al.,* v. *Callery Properties, Inc.,*[22] that the Commission has discretion to determine all aspects of present and future public convenience and necessity on the single inquiry of whether the price proposed is in line with existing prices, and if not, to condition to a level no higher than the existing level of prices in the area under review. We deny that when considering a certificate application solely on in-line evidence, the Commission has further discretion to pick and choose among permanently certificated prices, not subject to review, those which it will use to create a price line or refuse to consider. The entirety of the concept is an artificial one.[23]

The in-line price method approved by the Supreme Court in the *Callery* case for the South Louisiana area, both recognizes and restricts Commission discretion in a certificate proceeding. When cost and economic evidence offered by Petitioner to show why a proposed price is justified, even though it may be out of line, may be properly excluded, the only remaining evidence to be reviewed is restricted to that relating to field price data, all of such field data must be considered unless immaterial, irrelevant or excludable as suspect. When the Commission's discretion to enter on such a restricted hearing is exercised and approved by this Court, it thereafter has no discretion to pick and choose from the relevant and material evidence adduced for

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[22] 382 U.S. 223, 86 S. Ct. 360 (1965).

[23] *P.S.C.* v. *F.P.C.,* 373 F. 2d 816 (CADC 1967). Joint Appendix III R. 4304.

its determination of the price line without explanation or justifiable legal reason set forth in its decision.

Courts ought not to have to speculate as to basis for an administrative agency's conclusion. Conclusions must be rationally supported by findings and show the basis of all issues of fact, law and discretion. *Northeast Airlines* v. *C.A.B.*, 331 F. 2d 579 (1CCA 1964). The Commission or any agency must make findings that support decisions and such findings must be supported by substantial evidence in the record. Mr. Justice White speaking for this Court in *Burlington Trunkline Inc.* v. *U.S.*, 371 U.S. 156, 83 S. Ct. 279 (1962), stated:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. And for the courts to determine whether the agency has done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it. . . . The agency must make findings that support its decision and those findings must be supported by substantial evidence." At page 167.
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> "The courts may not accept Counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself."[24]

Moreover, determination of the "substantialness" of the evidence must be reflected by the whole record and not improper selections of record evidence without

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[24] 371 U.S. at pages 168-169 referring to *S.E.C.* v. *Chenery Corporation*, 332 U.S. 194, 196, 67 S. Ct. 1575, 1577.

stating adequate reasons for its findings and conclusions.[25]

A. Callery Does Not Foreclose This Court's Price Line Review

The in-line price for District No. 3 has never, prior to the Court's review below, been affirmed on or subjected to judicial review. *Callery,* in affirming the in-line price found for South Louisiana after elimination of suspect prices affirmed the general doctrine of suspect price exclusion. The principle of that case is, of course, applicable to our proceeding but different records, procedural histories, and factual situations exist. *Callery* did not inquire into any specific application of the suspect doctrine and because of its procedural posture before this Court should be limited to the particular circumstances there involved. The circuit court reviewing the in-line pricing technique of the Commission in the South Louisiana case rejected the entire finding for failure to consider aspects of present and future public convenience and necessity other than price line data. The issue of the mechanical inputs and exclusions of prices upon which to base a "price line" as employed by the Commission was never reached. 335 F. 2d 1004. On certiorari, the Commission's in-line price determination was affirmed by this Court without any discussion of the particular application of the exclusions justified as suspect. The producer respondents there involved did not brief that issue as they took the position such issue, not being in the questions presented in the Petition for Certiorari, was not before the Court for determination. Mr. Justice Harlan, in a separate concurring opinion, stated:

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[25] *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490; 71 S. Ct. 456. Also *U.S.* v. *Carlo Bianchi and Co.,* 373 U.S. 709, 715, 83 S. Ct. 1409; *Mississippi River Fuel Corp. v. F.P.C.,* 163 F. 2d 433 (CADC 1947).

"In locating the in-line price, the Commission has ignored a number of contemporaneous high-priced contracts labelled suspect because then under review, disapproved, or deemed influenced by those under review or disapproved. Although the danger of using a crooked measuring rod demands some precaution this blanket exclusion also chances some distortion in favor of an unduly low in-line price. In the main, producers have chosen not to brief this question, apparently on the misapprehension that the government has not here sought to sustain the exclusion of these contracts or that the lower Court's failure to reach the question precluded this Court from doing so. *But while the suspect order rule may by default be abided in this instance, I would not close the door to future arguments for a different solution of the dilemma.*" [26] (Emphasis added)

It is this "crooked measuring rod" which we now assert was erroneously employed in the Commission's instant in-line price determination which we feel the Court should find erroneous. The Commission has, by legal error, under the guise of inclusions and exclusions justified under the suspect doctrine improperly, here determined the applicable in-line price for District No. 3.

B. The Suspect Price Doctrine

The first court to interpret this Court's CATCO case was the Ninth Circuit's *U.G.I.* v. *F.P.C.*, 283 F. 2d 817 (9CCA 1960). The court there stated that the line referred to in CATCO should refer to relevant and existing producer prices which were current and "under which substantial amounts of natural gas move in interstate commerce." The Court went on to alert the

[26] 382 U.S. 223, 86 S. Ct. 360 (1965) at page 228.

Commission that in-line concept did not allow a roll-back to prices. It held:

> "The price line is intended to reflect current conditions in the industry and not conditions in the years preceding the subject contracts . . . Contracts should be comparable from the standpoint of gas reserves and future potentials." At page 824.

The Ninth Circuit then qualified the evidentiary basis for price line determination by pointing out that prices then before the Commission, or the courts for review, because of the possibility of change on review were not to be considered and that "a substantial number of certificated prices under court review, like prices in the same area though not currently under review ought to be regarded as suspect" because of the same possibility, unless it could be shown that such possibility of change in price was not present, i.e.,

> "such similar prices ought not to be relied upon in fixing a line except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the present proceedings." At page 824.

It did not hold nor has the suspect price doctrine ever stood for the proposition that a permanent certificate, final and no longer subject to review, is in any respect not relevant to or suspect in an in-line determination. These prices, otherwise material, are the prices the Ninth Circuit required be considered to determine an in-line price.

C. The Commission Retreat From Callery

This Court in *Callery,* applying the in-line principles of CATCO as implemented by the *U.G.I.* Ninth Circuit decision, affirmed the Commission contention that

the in-line price level should be the highest price at which substantial amounts of gas had been certificated to enter the market under other contemporaneous non-suspect certificates. Only the basic methodology asserted by the Commission in *Callery* was approved by this Court.

> "We believe the Commission can properly conclude under Section 7 that adequate protection to the public interest requires as an interim measure that *gas not enter the interstate market at prices higher than existing levels.*" [27] (Emphasis added)

The Commission, in this instant case, by the use of a crooked measuring rod to determine and exclude so-called suspect prices, has failed to fix a "line" supportable by the evidence, at either the highest level of existing prices or at the weighted average level of permanent final certificate prices. The Commission has erred, as did the Court below, to the extent it affirmed the Commission. Necessarily the Court below even more grievously erred in finding the Post-Statement price was not more than adequately supported by substantial record evidence.

D. The Current Conditions Requirement Can Only Be Met by Considering Temporary Prices

The in-line concept of CATCO requires the Commission to determine price lines that reflect current conditions in the industry. A price freeze was neither intended nor permitted. Current conditions are to be reflected. Erroneously, the court below held that CATCO logically required not only a freeze of the price line but complete disregard for current conditions.[28]

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[27] 382 U.S. 223, 228.

[28] IV R. 4314.

The Fifth, Ninth, Tenth, and even the D. C. Circuit in an earlier case[29] approved the concept of a price line being changed if the facts and findings of record evidence so required.

Callery said the proper and only evidence necessary to establish a price line and allow a proper evaluation of all factors bearing on the public convenience and necessity was the field price study, including temporary and permanent certificates.[30] The Statement of General Policy 61-1, issued by the Commission September 28, 1960, as amended, sets the guideline price levels. It has directly affected producer-pipeline interstate contract price negotiations, as well as determined Commission policy in fixing price conditions attached to temporary or permanent certificates. In 2nd Phillips[31] this Court acknowledged the significant role of the Statement of General Policy in arresting upward producer prices and in issuing considered conditioned certificates.

If the many Commission and court statements requiring certificates to reflect current conditions in the industry are to have any substance and meaning, then the Commission, of necessity, is required to rely on field price evidence directly attributable to and induced by its Policy Statement to determine a current price line. The consideration of prices induced, if not required by the Commission's Policy Statement, as shown

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[29] *Continental Oil Company* v. *F.P.C.*, 378 F. 2d 510 (5 CCA 1967); *U.G.I.* v. *F.P.C.*, 283 F. 2d 817 (9 CCA 1960); *Sohio Petroleum Co.* v. *F.P.C.*, 298 F. 2d 465 (10 CCA 1961); *Atlantic Refining Co.* v. *F.P.C.*, 316 F. 2d 677 (CADC 1963).

[30] *U.G.I.* v. *Callery Properties, supra,* at page 227.

[31] *Wisconsin* v. *F.P.C.*, 373 U.S. 294, 83 S. Ct. 1266 (2nd Phillips 1963).

by only temporary certificates contemporaneous with the sales of Superior in 1959 and 1962, an in-line price of 18.05 cents for the 1958-1963 period.[32]

E. Erroneous Determination of Suspect Prices and Their Exclusion From Consideration of the In-Line Determination Results in an Erroneous Line Determination

Under an erroneous concept of the suspect price doctrine the following comparable prices were excluded before mathematically computing the weighted average price, the basis for the in-line price determination.

(1) *The 20-cent Trunkline Permanent Certificates.* The elimination from the price line determination of the nine 20-cent sales to Trunkline Gas Company, permanently certificated and no longer subject to court review, resulted in a price line determination which is admittedly erroneously low if such should be considered.

> "Arithmetically, the large volumes of 20 cents would have a strong effect on the weighted average of 15.16 cents per Mcf, but these should be discounted as was done in Texaco Seaboard, where six of the nine sales were involved in the Trunkline Gas Company, et al., 21 FPC 704 (1959) with respect to which New York's petition for review was dismissed because not timely. *PSC* v. *FPC*, 284 F. 2d 200 (CADC 1960). Concerning these sales and those in other categories above 16 cents, the Commission stated in Texaco Seaboard:
>
> > " 'it is thus apparent that the prices at the 17.5 cent level and above must all be discounted since they either have subsequently been set aside (and are presently before us for new decision) *or would have been set aside,* for failure to permit a proper party to intervene, save for the proce-

[32] IV R. 7296.

> dural defect in the PSC review action in the Trunkline case'." (Emphasis added) (Footnotes omitted)[33]

The Opinion of the District of Columbia Circuit Court on review stated:

> "In this case, over Superior's objection the Commission refused to give full weight to certain 20-cent sales. According to the FPC these and similar sales should be discounted because 'they either have been subsequently set aside . . . or would have been set aside . . . save for the procedural defect in the PSC review action.' This reason is adequate, and we do not think the Commission abused its discretion by not giving full weight to the 20-cent sales."

While the word "discount" was used, its effect was also stated "to which in any case we give little weight." Both expressions were understatements. Any weight would have required a different result, and they were entitled to full weight.

Petitioner submits that the disregard by the Commission as affirmed by the Court below of the 20-cent Trunkline sales with their underlying large volumes[34] is legal error resulting from a misunderstanding of the Ninth Circuit UGI suspect price doctrine. We believe there is no doubt that the 20-cent sales are comparable, current and admittedly to be fully considered if non-suspect. The Commission has no discretion to ignore or disregard or substantially discount such sales in the application of this artificial concept. Legal error rather than an abuse of discretion is involved.

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[33] III R. 7296.

[34] 1,515,650 Mcf estimated first month volumes constituting 60 per cent of those permanent certificates volumes reviewed.

The D.C. Circuit accepted the Commission argument that since six of the nine 20-cent sales in 1960 were subject to judicial review (the situation and time at which the Ninth Circuit spoke in *U.G.I.* describing such sales as not relevant) such sales would never thereafter be relevant in an in-line price determination even though the 1960 judicial review resulted in legal affirmance of these 20-cent sales. The review was dismissed, *P.S.C. of N.Y.* v. *F.P.C.*, 284 F. 2d 200 (CADC 1960). Such an argument and holding is not sustainable. When judicial review is exhausted and the price is unchanged, it is at least as relevant as prices which become final as a result of no party seeking rehearing or judicial review.

The Commission also urged to the Court below that this Court in *Callery*[35] had previously rejected Superior's contention that the termination of judicial review in six of these same 20-cent sales removed the factor which had made them not relevant in 1960 in that *Callery* had affirmed the Commission Order declaring those six sales permanently suspect. The Commission contention is misleading.[36] The question of

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[35] *U.G.I.* v. *Callery Properties Inc.*, et al., *supra.*

[36] The Commission, indeed, did hold that all certificated prices in excess of 18½ cents per Mcf (exclusive of tax reimbursement) in South Louisiana were suspect and to be excluded from consideration in fixing a South Louisiana price line. When, however, the matter reached this Court, the questions presented upon which certiorari was granted were:

> "1. In determining the initial price at which it will certificate a producer's sale of natural gas under Section 7 of the Natural Gas Act, must the Commission receive and consider evidence (voluminous economic and financial evidence, including individual-company, areawide, and nationwide studies and data concerning cost of service, cash flow, supply and demand,

specific application of the suspect price doctrine was not raised nor considered. The Commission brief in *Callery* called all prices in excess of the CATCO price

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profit and market price trends, cost-revenue trends, comparative well costs, etc.) other than that relating to the determination of a price at which the gas can enter the interstate market without disrupting the level of prices in that market?

2. May the Commission condition the grant of a permanent certificate to sell gas in interstate commerce upon the applicant's refraining from filing any rate increases above a specified level, fixed to avoid triggering escalations of other prices, during the pendency of the area rate proceeding, but not after July 1, 1967?

3. May the Commission, in granting a permanent certificate to sell gas in interstate commerce at an in-line initial price, require that the applicant refund all charges in excess of that price that were previously collected under an earlier unconditioned certificate which had been invalidated on court review?"

Page 3 of Brief for FPC in Nos. 21, 22, 26 and 32, October Term 1965, *U.G.I.* v. *Callery Properties, et al.*

FPC by a footnote stated on the last page of its Application for Writ that if the Petition were granted, it would "set forth our reasons for believing that the Commission's method was proper and no remand on this point is necessary." Footnote 14, page 15 of Application for Writ.

Respondents, feeling that this was not sufficient to permit consideration by the Court of the correctness vel non of the in-line price, did not brief the issue, but requested the right to file a supplemental brief thereon if the question was to be considered. Thus, when the Court considered the *Callery* case, it affirmed the Commission price line finding determined from remaining certificate prices after exclusion of Commission self-declared suspect prices. A South Louisiana price was declared suspect if "at prices equal to or higher than the CATCO level." Further, the Commission asserted that "the evidence was uncontradicted, the specific findings undisputed, and the only question is whether the Commission acted improperly in fixing the in-line price at the highest level after eliminating from its consideration the unsupported CATCO prices and similar prices obviously influenced by the Commission's earlier erroneous certification of the CATCO contracts." Page 31 of the Commission Brief in No. 21, October Term, 1965, *U.G.I.* v. *Callery Properties.* Of course, CATCO prices in South Louisiana are not relevant in Texas Railroad District No. 3.

suspect because they were higher[37] than the prices found out of line in CATCO, not because they were subject to review. Of course, the CATCO price level is not applicable here. No decision of this Court has found a Texas Railroad District No. 3 sale in or out of line. Mr. Justice Harlan's comment quoted above shows the "default" nature of *Callery* as to the South Louisiana price line determination. The future argument referred to by Mr. Justice Harlan is now presented by Petitioner. Clearly, this Court's *Callery* decision, accepting the in-line price determination in South Louisiana, is not binding on the Texas District No. 3 price line determination.

In *U.G.I.* v. *F.P.C.* decision,[38] Judge Hamley, speaking for the Ninth Circuit, addressed himself to a contention by U.G.I., a distributor petitioner, that prices in proceedings to which it or the Public Service Commission of the State of New York were denied the right to participate should not be considered in determining a price line.

> "The objection [to the prices in proceedings where PSC or UGI were denied the right to intervene] is not abstract . . . UGI asserts that the 16 schedules were certified in four proceedings in which UGI and NY were denied the right to participate." At page 824.

The Ninth Circuit made clear that the Commission, in determining the price line, should not consider

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[37] Commission Brief in Callery, October Term, Nos. 21, 22, 26 and 32, *U.G.I.* v. *Callery Properties, supra.*

[38] 283 F. 2d 817 (9 CCA 1960).

sales with prices subject to court or Commission review. Nor should they consider like prices which were not then subject to review unless it be shown they do not have the same infirmities. They were also suspect. The court's stated reason was that in the event the existing rate subject to review is later modified or conditioned as a result of the pending proceedings, the foundation of the line derived therefrom would be undermined and "like prices" might equally be reduced.

> "The acceptance of a questioned existing price as a guide in setting the line might itself have the anomalous effect of creating a standard by which the questioned rates would then be judged." At page 824.

When the relevant prices in pending proceedings on review were finally left unchanged, and "like prices" were found not to be "infirm" these prices are no longer suspect. The anomalous effect was no longer possible. The Ninth Circuit concurs.

> "Where such a denial of the right to participate in prior proceedings has not been judicially challenged, the fact of denial should not preclude the Commission from referring to the initial price therein certified in the process of fixing a line in a subsequent proceeding. This is true, because *if not judicially challenged a Commission order excluding participation by others must be taken as correct.* (Emphasis added) At page 825.

In no way does it suggest that the price remains suspect[39] forever.

The computation of the price line for the Pre-Statement period reproduced in Opinion No. 475[40] reflects the total elimination of the Trunkline sales which were permanently certificated and not subject to any further Commission or court review. No evidence has been shown by the Commission, Staff or distributors that they were subject to the same infirmity or were similar to sales then under Commission or court review in 1965 when the price line determination was made in District No. 3. And yet, the Commission in their Opinion, improperly cites the Ninth Circuit case as support for their exclusion of not only the six Trunkline sales involved in the Ninth Circuit litigation but the three additional Trunkline sales at the same 20-cent level which were never subject to judicial review. That court held clearly to the contrary.

> "As previously indicated, the price line is intended to reflect current conditions in the industry. Therefore, comparative prices upon which it is based must be prices under which a substantial amount

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[39] The term "suspect" discussed by Commission in the *Texaco Seaboard* Opinion has far less permanent impact. Prices even at the time of pending judicial review could be considered.

> "In connection with our determination we may further observe that in our opinion the suspect price doctrine was not intended as a rigid exclusionary rule. If it were, comparatively low prices at fair and readily defensible levels might be made subject to litigation at the will of some intervening party and our authority to determine proper initial prices under the Natural Gas Act thus limited for reasons that are unrelated to the public interest." 29 FPC 593 at page 598 (1963).

[40] III R. 7294.

> of natural gas presently moves in interstate commerce. The limitation urged by UGI could well defeat this objective by restricting the comparison to a small number of contracts under which little gas moves today. It could in fact require a rollback to prices having no current relevancy." At page 824.

The Trunkline sales due to the pending petition for review of PSC's denial of intervention before the District of Columbia Circuit may have at one time been temporarily suspect in 1960. As such, they were then under a cloud for purposes of determining a price line. However, that review was unsuccessful and comparable permanent certificates at 20-cent prices are now final. The Trunkline 20-cent sales in Texas Railroad District No. 3 are unimpeached and unimpeachable as valid legal orders of the Commission and immune from collateral attack. A collateral attack upon a Commission order is not permitted. *Calanan Road Improvement Company* v. *U.S.*, 345 U.S. 507, 512, 73 S. Ct. 803, 806, 1953. *People of the State of California* v. *F.P.C.*, 353 F. 2d 16 (9CCA 1965). Such prices must be fully considered and equally weighed in determining the price line. The prices certificated therein as a matter of law must be taken as correct in subsequent proceedings. *U.G.I.* v. *F.P.C.*, 283 F. 2d 817, 825 (9CCA 1960). *People of the State of California* v. *F.P.C.*, 353 F. 2d 16 (9CCA 1965).

The previously shown certificate array used by the Commission for the Pre-Statement period, if modified only by the addition of 20-cent price contracts permanently certificated and previously eliminated by the Commission, illustrates the effect of including and excluding such 20-cent sales.

DISTRIBUTION OF PRICES PERMANENTLY CERTIFICATED
(Dated 1-1-58 through 9-27-60)

Total Initial Price (¢)	Number of Sales	Estimated First Month Volumes (Mcf)	Percent of Total Volume (1) without 20¢ sales	Percent of Total Volume (2) with 20¢ sales
Less than 10.0	3	120,000	4.50	2.87
13.5	8	116,100	4.35	2.78
14.0	3	60,750	2.28	1.45
14.2	1	45,000	1.69	1.07
14.4	1	90,000	3.38	2.16
14.5	4	132,000	4.95	3.15
14.6	2	96,000	3.60	2.30
15.0	8	295,075	11.07	7.05
15.1	1	60,000	2.25	1.44
15.2	3	166,170	6.23	3.97
16.0	4	968,000	36.31	23.15
16.2	4	514,000	19.28	12.29
17.5	1	2,190	0.08	0.05
18.0	1	731	0.03	0.02
	44	2,666,016		63.75
20.0	9	1,515,650	....	36.25
	53	4,181,666	100.00	100.00

Volumes under the 20-cent price constitute 36.25 per cent of all volumes permanently certificated and no longer subject to court review. Under the highest level of prices not suspect,[41] the in-line price for this period must be 20 cents per Mcf. The weighted average price for all sales is 16.9 cents per Mcf. Following the recent technique of the Commission,[42] the selection of

[41] The method advocated by the Commission to this Court and approved in the *Callery* opinion.

[42] *Amerada*, Opinion 422, 31 FPCA 623; *Hassie Hunt*, Opinion 412, 30 FPC 1438; *Hawkins*, Opinion 475, 34 FPC 897; *Sinclair*, Opinion 476, 34 FPC 930; and *Turnbull and Zoch*, Opinion 478, 34 FPC 1001.

a price line must fall somewhere between the weighted average price of 16.9 cents and 20 cents, the highest level of existing prices. This alone highlights the *total disregard* (not discount or little weight given) of the 20-cent sales and volumes. Without them more than 55 per cent of the volumes of gas deemed proper for in-line price purposes was at rates of 16 cents or more. The finding of the Commission, due to Commission legal error in determining the components on which to base the price line, must be corrected and a new in-line price determination, including the impact[43] of the nine 20-cent permanently certificated sales to Trunkline under which more than one-third of the gas flows, must be included. *U.G.I.* v. *F.P.C.*, 283 F. 2d 817 (9CCA 1960).

(2) *The Denial of a Fair Hearing.* The Commission reliance in Opinion No. 475 below, justifying the exclusion of the 20-cent Trunkline sales, makes reference to Opinion No. 383, *Texaco Seaboard, et al.*, 29 FPC 593, where such sales were first characterized as being suspect. Petitioner was not a party to the *Texaco Seaboard* Opinion. Factual conclusions in that case necessarily based on the record made in that proceeding is not controlling or relevant to any factual conclusions or findings that the Examiner and the Commission may have made on the record below. Each separate Commission proceeding must stand upon its own record, regardless of the facts found or shown

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[43] These Trunkline sales were issued by the Commission on May 22, 1959. These sales are made today to Trunkline at 20 cents per Mcf under permanent certification. Petitioner's sale to Florida Gas results from a contract executed on August 1, 1959. The impact of these certificate sales, now final, at the time of the 1959 contract negotiation had controlling effect upon Petitioner's price negotiation.

in other proceedings. *U.S.* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 66 S. Ct. 687, p. 528 (1946). The Administrative Procedure Act, 5 U.S.C. 100(c), requires an agency to make findings based on evidence in the record before it and not other proceedings. The Commission here did not do so but merely looked to see if this record contained evidence to change the findings of the *Texaco Seaboard* Opinion No. 383 and *Hassie Hunt* and *Texaco Seaboard* are substituted in findings of other proceedings to which Petitioner is not a party, the standard of proof of the public convenience and necessity is removed and the findings of Hassie Hunt and Texaco Seaboard are substituted in lieu thereof. The field price studies used to determine the weighted average price in each case are not similar in the slightest and yet the findings are considered conclusive. Petitioner has been denied a fair hearing guaranteed by the Fifth Amendment to the Constitution and the Administrative Procedure Act.

(3) *The 17.5 cent Permanently Certificated Coastal Sales.* There exists a number of permanent certificates at 17.5 cents in District No. 3 reflecting sales to Coastal Transmission Corporation under contracts in the years 1955 and 1956.[44] The Commission justification for exclusion of these sales[45] for the price line adopts the

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[44] Houston Texas Gas and Oil Corp. 16 FPC 118, 141-142, 17 FPC 303, 310.

[45] III R. 1425, 1427-1428. Estimated volumes total 1,196,206 Mcf for the first month of deliveries. Petitioner does not assert that such sales are contemporaneous for a price line determination for Petitioner's 1959 and 1962 sales but rather here highlights the Commission's consistent erroneous interpretation of the suspect price doctrine. Petitioner's sales were also to Coastal and at the same 17.5 cent per Mcf contract price.

reasons stated in the *Texaco Seaboard* Opinion No. 383 and *Hassie Hunt Trust* Opinion No. 412 cases wherein no effect was given to these Coastal sales. The reasons stated in Opinion No. 383 for their exclusion in the price line determination were (1) that Coastal was then a new pipeline company that had neither a certificate nor was yet in operation and therefore such sales may have taken place at higher prices than would have occurred under contracts with an established pipeline due to the additional risk factor; (2) that [redacted] 17 cents and above at the time of *Hassie Hunt* and *Texaco Seaboard* (1962-63) were in litigation and were therefore suspect; and (3) that they were issued prior to the Supreme Court CATCO decision. It is therefore not clear on which of these grounds the Commission excluded these sales below. If it excluded these sales because of their being suspect due to being in litigation at the time of the *Texaco Seaboard* Opinion No. 383, then such exclusion is in error for the same reasons stated in the discussion above in the 20-cent Trunkline sales. Such 17.5 cent permanent certificates are no longer subject to judicial review and are no longer suspect. If the reasons for their refusal to include such 17.5-cent permanent certificate prices is that such sales took place prior to CATCO, then such exclusion contradicts the Ninth Circuit *State of California* v. *F.P.C.* case, 353 F. 2d 16 (9CCA 1965) where pre-CATCO certificates should be considered if otherwise comparable. If the reason for the reliance was the non-comparability of Coastal Transmission Corporation sales with the contracts executed between producers and established pipelines, then Petitioner submits such rationale is totally absent in the Commission opinion and is contrary to *Burlington Trunkline* v. *U.S.* Supreme Court decision, 371 U.S.

156 (1962) wherein Mr. Justice White stated that "a court in order to determine whether or not an agency has exercised its discretion within the bounds expressed by the standard of public convenience and necessity, that "agency must 'disclose the basis of its order.' . . . The agency must make findings that support its decision, and those findings must be supported by substantial evidence."[46] This Court, as well as the Court of Appeals for the District of Columbia Circuit, should not be required to speculate as to the basis of the administrative agency's conclusions. The skimpy handling of the Coastal sales by the Commission in Opinion No. 475 below required all to so speculate.

(4) *Permanent Certificates Resulting from Settlement Were Excluded.* The elimination of prices certificated in settlement orders from the price line determination was erroneous. The Examiner's decision shows that settlement orders were not used in the derivation of the price line.[47] The only reason given for such exclusion was the fact that they reflect settlement rates[48] and are not appropriate for in-line price

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[46] 371 U.S. at 167.

[47] III R. 6785 and R. 6788.

[48] The excluded dockets:

1. Tidewater Oil Company, Docket No. G-17578, a 17½ cent contract settled per Commission Order of June 15, 1962 at the then existing guideline rate of 16 cents.

2. Tidewater Oil Company, Docket No. 18376, a 17.5-cent contract price settled per Commission Order of June 15, 1962 at the then guideline price of 16 cents per Mcf.

3. Shell Oil Company, Docket No. G-19571, a 20-cent contract certificated at 17.0 cents per Mcf per Commission Order of August 1, 1962 at the guideline rate.

determination. The questionability of this review is raised by an Examiner's opinion in *Union Texas Petroleum* Opinion 436, 32 FPC 254 (1964) now pending before this Court on a Petition for Writ of Certiorari No. 516 October Term 1967.

> "Citing the conventional reason for disregarding settlements in arriving at a judgment ('settlements may be a simple desire to end protracted litigation'), Staff and Continental conclude that 'no consideration should be given to settlements in determining' the price line at issue herein.
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> "This reasoning is fully applicable to private litigation but is of doubtful validity when applied to Commission determinations of the public interest. Decisions as to the correct price line for gas sales is, of course, entirely a matter of public interest, as repeatedly stressed in the court decisions *supra*." 32 FPC 305.

Regardless of the parties reasons for desiring settlement, the Commission's obligation under the Natural Gas Act is unchanged. It may not, for its convenience or otherwise, issue orders which are not in the public interest. It cannot properly approve prices which are contrary to public interest. Settlement orders spe-

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4. Gulf Oil Corporation, Docket No. G-20383, a 20-cent contract certificated a settlement rate of 16 cents per Mcf by Commission Order of April 25, 1963 at the in-line rate established in Texaco Seaboard Opinion No. 383.

5. Gulf Oil Corporation, Docket No. CI 60-412, a 17½ cent contract rate certificate at a settlement rate of 16 cents per Mcf by Commission Order of April 25, 1963 at the in-line price determined in the Texaco Seaboard Opinion No. 383.

6. Cities Service Oil Company, Docket No. G-19559, a 1959 contract certificated at 18-cent settlement rate per Commission Order of December 26, 1962 at the guideline rate.

cifically find the settlement prices to be required by the public interest. They are permanent certificate orders, in all respects final and beyond review. They are not even claimed to be suspect or erroneous. Settlement prices represent, therefore, current conditions in the industry. Consistent Commission policy towards the settlement of any case has been at the applicable area price ceiling for initial sales then stated in the Statement of General Policy 61-1, as amended, where the contract rate proposed is higher than said ceiling rates. In addition, then, they reflect the considered judgment not only of the Commission and the producer but also the distributor-intervenors and state commissions who have actively participated, as to what is believed to be the in-line price at the time of settlement. Further, such volumes[49] whether at the 18-cent, 17-cent or 16-cent settlement rates cited above, justify an increased weighted average price. The effect of including the 20-cent Trunkline sales and the settlement dockets in the permanent certificate Commission array results in a weighted average price in excess of 17 cents per Mcf and higher in-line prices for both periods.

The settlement prices represent the minimum in-line price. The failure of the Examiner and the Commission to include such prices in the in-line price determination with their respective volumes, constitutes legal error on the part of the Commission.

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[49] Estimated volumes total 472,183 Mcf for the first month of deliveries.

F. Commission Use of Estimated Volumes When Actual Volumes Were Available

The Commission's refusal to use actual volumes where available in lieu of inaccurate estimated volumes in in-line price determinations constitutes error.

The Commission acknowledged that the use of actual volumes for the Pre-Statement period tends to increase the percentage of the 20-cent Trunkline permanent certificate sales.[50]

The Commission's justification for the use of estimated monthly billings rather than the actual volumes sold and flowing in interstate commerce is that in their opinion the monthly estimates "are an appropriate method by which to determine the relative importance of the gas sold in each price category." Monthly averages of actual volumes are available in the Commission files for each and every year up to and including the year 1962. At the time of the proceedings before the Commission, only isolated volumes were not known for the year 1962 and rather anomalously even more actual volumes were known for the year 1963. The complete actual volumes were known for all of the years 1955-1961, and are now on file at the Federal Power Commission. Study of the actual volume data reveals that the estimates made are inaccurate. The volume of higher prices was generally underestimated. The volume for the lower prices was generally overestimated. The Table tabulated below is the identical certificate array table used by the Commission,[51] to which columns showing 1962 actual volumes and percentages derived from Exhibit 10, Schedule 1, and the 20-cent Trunkline sales have been added.

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[50] III R. 7296.
[51] III R. 7294.

DISTRIBUTION OF PRICES PERMANENTLY CERTIFICATED
(Dated 1-1-58 through 9-27-60)

Total Initial Price (¢)	Number of Sales	Estimated First Month Volume (Mcf)	Percent of Total Volume	Monthly Average of 1962 Actual Volume (Mcf)	Percent of Total Volume
Less than 10.0	3	120,000	2.87	120,000*	3.01
13.5	8	116,100	2.78	116,100*	2.92
14.0	3	60,750	1.45	26,422	0.67
14.2	1	45,000	1.07	148	0.00
14.4	1	90,000	2.16	48,675	1.23
14.5	4	132,000	3.15	148,514	3.73
14.6	2	96,000	2.30	62,126	1.56
15.0	8	295,075	7.05	102,404	2.58
15.1	1	60,000	1.44	28,808	0.70
15.2	3	166,170	3.97	282,946	7.12
16.0	4	968,000	23.15	920,362**	23.15
16.2	4	514,000	12.29	151,580	3.82
17.5	1	2,190	0.05	1,639	0.04
18.0	1	731	0.02	2,767	0.07
20.0	9	1,515,650	36.25	1,962,306	49.37
	53	4,181,666	100.00	3,974,797	100.00

* Estimated volumes.

** 3 sales actual 672,362 Mcf
1 sale estimate 248,000
920,362

49.37 per cent of all gas is thus shown to be flowing in interstate commerce at 20-cent certificate prices. Even a discounting as opposed to total disregard of the 20-cent sales requires the Commission to note the tremendous impact of the actual volumes for such sales. If it be assumed that such sales in any event would have been certificated at the highest price deemed not suspect under the Commission's erroneous concept of that doctrine, i.e., 18.0 cents per Mcf, the weighted average price by this technique would be greater than 17 cents per Mcf.

G. Exclusion of Consolidated Temporary Sales

Thirty-two of the 36 contracts consolidated in the proceeding below for certification under Section 7 have flowing monthly volumes amounting to 16,484,300 Mcf at 14.65 psia. Estimated volumes under permanent certificates total 2,666,026 Mcf. The in-line price here certificated is, therefore, based on a line derived from only one-fifth of the volume of sales at issue. The tail is wagging the dog. The Commission's further action ignoring 1,962,797 Mcf (actual) or 1,515,650 Mcf (estimated) 20-cent sales volumes results in the price line being determined by less than one-eighth of the sales volume in Texas District No. 3. The refusal to consider actual volumes where known and available and reliance in lieu thereof on known inaccurate estimated data is totally unsupportable. The sometimes offered excuse of unavailable data is not valid here. The impact of the few estimate only volumes for 1962 is de minimus.

H. Intrastate Volumes and Non-Comparable Low-Priced Sales

The refusal by the Commission to consider increasing intrastate volumes in the face of decreasing interstate volumes[52] in determining the price line constitutes an arbitrary action by the Commission to arrive at a predetermined price line. In Opinion No. 383, *Texaco Seaboard, supra,* and *Hassie Hunt* Trust, Opinion No. 412, *supra,* the Commission in making a District No. 3 price line determination found only permanent non-suspect certificate sales at or above 14 cents per Mcf to be comparable. Certificates less than 14 cents were excluded. Yet, in this proceeding, again involving the price line determination for District No. 3, permanent

[52] III R. 222, 1364, 1491.

certificates at prices less than 14 cents were fully excluded in the weighted average price without any record finding of comparability. Such inclusion was arbitrary and unsupported by the record below and results in prejudicial error to Petitioner.

With one exception[53] every exclusionary and inclusionary ruling made by the Commission resulted in the lowering of the weighted average price and subsequent low price line determinations. Some, including the exclusion of the 20-cent Trunkline sales and settlements, were prejudicial errors which must be corrected to reflect the proper price line for the 1958-63 period. Other rulings, including the refusal to consider actual volumes and intrastate evidence, although individually not arbitrary and capricious to warrant reversal by this Court, when viewed from the impact of all such rulings require the finding that proposed prices are unduly low prices and are based on volumes that constitute hardly a fraction of the actual volumes flowing in District No. 3. The Commission, by distributor's intervention policy and the improper use of the suspect price doctrine, has disregarded the warning made to the Commission by the Ninth Circuit Court in *U.G.I.* v. *F.P.C.* that a price line should reflect current conditions in the industry and not reflect a rollback to prices having no current relevancy. A small number of contracts under which little gas moves, much of which is non-comparable, has determined the in-line price. Petitioner submits this Court in its CATCO and *Callery* decisions did not anticipate or intend this result to occur.

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[53] Certain sales by producers to Valley Gas Transmission held not comparable due to their purchases at less than the price line and eventual resale to interstate pipelines at a higher price.

IV. THE COURT OF APPEAL ERRED IN DECLARING THAT THIS COMMISSION MUST DETERMINE PUBLIC AND PIPELINE NEED FOR GAS IN PRODUCER CERTIFICATE PROCEEDINGS.

Petitioner hereby adopts Section IV of the Joint Petitioner-Producers' Brief on the issue of public need determination by the Commission in a producer certificate proceeding.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner prays that the judgment of the Court of Appeals be reversed and the case remanded with directions to vacate and set aside Commission's Opinion No. 475 and the orders thereof.

Respectfully submitted,

WILLIAM T. KILBOURNE II
1725 K Street, N.W.
Washington, D. C. 20006
Attorney for Petitioner
The Superior Oil Company

Of Counsel:

MURRAY CHRISTIAN, *General Counsel*
H. W. VARNER, *Asst. General Counsel*
HOMER J. PENN
The Superior Oil Company
P. O. Box 1521
Houston, Texas 77001

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